IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10461 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GIGABHAI KHIMJIBHAI DETHARIA

Versus

STATE OF GUJARAT

Appearance:

MR CL SONI for Petitioner

MR. K.T. DAVE, AGP, for Respondent Nos. 1 & 2

MR HS MUNSHAW for Respondent No. 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 19/06/2000

ORAL JUDGEMENT

Rule. Mr. K.T. Dave, learned A.G.P. waives service of rule on behalf of respondent Nos. 1 and 2 and Mr. Munshaw for respondent No. 3. In the facts and circumstances of the case, the petition is taken up for

final disposal today.

2. This petition is directed against the order dated 11.9.1997 passed by the learned Joint District Judge, Rajkot, rejecting the petitioner's application for condonation of delay in filing the appeal under Section 267(4) read with Section 121(6) of the Gujarat Panchayats Act, 1993 (hereinafter referred to as `the Act').

3. The Development Commissioner had passed an order dated 15.6.1995 under Section 265 of the Act holding that the petitioner had caused loss of Rs. 1,34,030.50 to the District Panchayat and had accordingly directed the petitioner to pay up the said amount to the panchayat. According to the petitioner, the said order was received by the petitioner on 19.12.1996 and therefore, appeal was required to be filed within 30 days from 19.12.1996. However, on receiving the said order, the petitioner fell sick and he was required to undergo treatment at the hands of Dr. M.G. Patel of OM Hospital, Rajkot. The doctor advised the petitioner to take rest for three weeks and therefore the petitioner could not file the appeal immediately and there was a delay of 21 days in filing the appeal and the appeal came to be filed on 11.2.1997. The petitioner filed an application for condonation of delay of 21 days. However, when the application was called out for hearing, neither the applicant nor his advocate was present. The learned Joint District Judge examined the application for condonation of delay on merits and held that the applicant had not produced any documentary proof to show sufficient cause for the delay in filing the appeal. The application therefore came to be dismissed by the impugned judgement and order dated 11.9.1997. It appears that the petitioner thereafter filed an application in September, 1997 pointing out that when the application for condonation of delay was called out for hearing, the petitioner's learned advocate had gone to Haj Pilgrimage. The petitioner had therefore made an attempt to engage another advocate but the said advocate had asked the petitioner to give him no objection certificate of the first advocate which could not be done within time and therefore the second advocate also did not attend the matter. The petitioner was however of the bona fide belief that since the file was entrusted to the second advocate, he would appear in the matter. The Joint District Judge rejected the said application for restoration (Misc. Civil Application No. 131 of 1997) on 7.10.1999 on the ground that the application for condonation of delay was rejected on merits and it was not merely dismissed for default and the application is

not tenable in law. The petitioner has therefore approached this court.

4. Mr. C.L. Soni, learned counsel for the petitioner has submitted that in view of the facts which were already on record as mentioned in the application for condonation of delay, there was sufficient cause for condonation of delay of 21 days. Mr. Soni further submitted that the medical certificate could not be produced earlier as none of the advocates was present. Mr. Soni has produced certificate dated 21.12.1996 which reads as under:-

"This is to certify that Mr. Gigabhai Khimabhai Deharia, aged 53 years is under my treatment. He is suffering from chest pain due to Angima Pectoris. He is advised to take rest for three weeks from 21.12.1996 onwards.

Sd/- (DR. M.G. PATEL)"

Mr. Soni further submitted that the petitioner is ready and willing to satisfy the appellate court that the petitioner has good case on merits and that even if ultimately the petitioner loses in the appeal, the petitioner will make good the loss which was already determined by the Development Commissioner as per the impugned order. To show the petitioner's bona fide, the petitioner further states that he is ready and willing to give bank guarantee for the aforesaid sum of Rs. 1,34,030.50 rounded off to Rs. 1,35,000/- within two weeks.

5. On the other hand Mr. K.T. Dave, learned AGP for respondent Nos. 1 and 2 and Mr. Munshaw for respondent No. 3 have submitted that no fault can be found with the order of the learned Judge as no medical evidence was produced along with the application for condonation of delay.

6. Having heard learned counsel for the parties and looking to the peculiar facts and circumstances of the case particularly in view of the fact that the learned advocate engaged by the petitioner for arguing the appeal before the appellate Court had gone on Haj pilgrimage and that the second advocate engaged by the petitioner did not remain present as indicated above and also taking into consideration the fact that the petitioner has agreed to give bank guarantee for the amount in question, interests of justice would be served if the delay in filing the appeal before the District Court under Section 267(4) of the Act and the District Court is directed to

hear the petitioner's appeal on merits in accordance with law subject to the condition that the petitioner furnishes bank guarantee to the District Panchayat for a sum of Rs. 1,35,000/- within two weeks from today.

7. In view of the above discussion, the petition is partly allowed. The order dated 11.9.1999 passed by the learned District Court below application Exh. 1 is hereby set aside and the petitioner's application for condonation of delay in filing the appeal is granted. Accordingly, the petitioner's appeal shall be heard on merits in accordance with law subject to the condition that the petitioner furnishes to the District Panchayat a bank guarantee for a sum of Rs. 1,35,000/- to pay the same to the District Panchayat in case the petitioner loses in the appeal. The petitioner shall furnish bank guarantee within one month from today.

8. The petitioner shall pay a sum of Rs. 1000/towards costs of this petition to respondent Nos. 1 and 2 in one set and another sum of Rs. 1000/- to respondent No. 3 within one month from today.

9. Rule is made absolute to the aforesaid extent.

(M.S. SHAH, J)
(pkn)